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No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLEES

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BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLEES

The Republican National Committee submits this brief as *Amicus Curiae* in support of Appellees' claim that the judgment of the United States District Court for the District of New Jersey, entered on March 8, 1982, should be affirmed. Pursuant to Rule 36.2, all parties to this action have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS

The Republican National Committee is a non-profit, unincorporated association whose main purpose is to promote the election of members of the Republican Party to public office. The Republican National Committee seeks the maintenance of fair election procedures in New Jersey so that partisan congressional redistricting will not dilute the voting rights of the citizens of New Jersey generally and members of the Republican Party specifically.

SUMMARY OF ARGUMENT

The district court below properly invalidated the congressional redistricting plan embodied in P.L. 1982, c.1, because of the failure of the New Jersey Legislature to make a good-faith effort to minimize the plan's population deviations as this Court's prior rulings require. New Jersey did not make a good-faith effort because, in the process leading to the adoption of the districting plan in dispute, population considerations were subordinated to partisan political interests.

Article I, § 2 of the United States Constitution requires an emphasis on the redistricting process and not, as Appellants argue, a focus on the end result alone. That requirement demands that the New Jersey Legislature make a good-faith effort to achieve the greatest population equality practicable, and does not leave the legislature free to debase the votes of political minorities and disregard the mandate of good-faith on the basis of arbitrary numerical approximations of equality. The court below properly concluded from the record that deviations from equality in P.L. 1982, c.1 were the result of a desire to entrench political interests, and only nominally the result of an effort to achieve population equality.

The lower court further concluded that Appellants failed to adequately justify those deviations from absolute equality found in P.L. 1982, c.1. Just as the acceptable population variances for congressional redistricting plans are low, so the acceptable justifications for any such variances are few. Appellants' emphasis on statistical aspects of the census is nothing but a disguised attempt to convince this Court to overrule prior decisions that declined to allow as *de minimis* deviations from equality that were not necessary. Further, Appellants' attempt to justify the deviations as intended to preserve minority voting strength is impeached by the record and is nothing but a cynical attempt to mask the true legislative purposes. Both proffered justifications are *ex post*

facto attempts to excuse the legislature's failure to make a good-faith effort to minimize deviations.

As Appellants' arguments demonstrate, there has been considerable recent litigation as to the meaning of this Court's directives in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), that a legislature must make a "good-faith effort to achieve precise mathematical equality." *Id.* at 530-31. In affirming the judgment of the court below, this Court has an opportunity to emphasize the proper application of *Kirkpatrick*.

ARGUMENT

I. LACK OF A GOOD-FAITH EFFORT TO MINIMIZE POPULATION DEVIATIONS IN CONGRESSIONAL REDISTRICTING CANNOT BE JUSTIFIED AND RENDERS THE CONFIGURATION CONSTITUTIONALLY INFIRM

A. Article I, § 2 of the United States Constitution Requires That a State Make a Good-Faith Effort to Achieve Population Equality Among Congressional Districts

In its first substantive congressional redistricting case, this Court enunciated the fundamental status of the right to vote in these terms: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964).

The right to vote can be undermined in many ways, directly or indirectly, sophisticatedly or simple-mindedly, innocuously or invidiously. To eliminate such voter discrimination, this Court further held in *Wesberry* that, "[t]he command of Art. I, § 2, that representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional

election is to be worth as much as another's." *Id.* at 7-8 (footnotes omitted). After surveying the history behind Art. I, § 2 of the United States Constitution, the Court concluded that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18.

In *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530-531 (1969), the *Wesberry* standard of "as nearly as practicable" was held to require the state to "make a good-faith effort to achieve precise mathematical equality." In rejecting the argument that a fixed numerical variance, if minute enough, should be ignored as *de minimis*, this Court held that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." *Id.* at 531. *Accord*, *White* v. *Weiser*, 412 U.S. 783, 790 (1973); *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969).

If these statements have any meaning, it is that no proffered justification will support a congressional districting plan where the state has failed to make an effort, in good faith, to minimize deviations from population equality. "Good faith" is the touchstone of *Kirkpatrick* and should remain the controlling standard in this case.

Appellants assert that "[t]he District Court read *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *White* v. *Weiser*, 412 U.S. 783 (1973), as invalidating any legislatively drafted congressional redistricting plan if it is possible that a plan with smaller census population deviations could be developed." Brief for Appellants at 7. Upon this assumption, Appellants then argue that there is no basis in law for such a standard and, therefore, that

"*Kirkpatrick* and *White* are satisfied when the Legislature's plan shows deviations from absolute census population equality that are less than the statistical imprecision of the census." *Id.*

Appellants' reading of the lower court's decision is wrong and their effort to limit *Kirkpatrick* and *White* is an unfounded and erroneous interpretation of the well-settled, well-reasoned principles of constitutional law enunciated by this Court.

The approach and emphasis in all redistricting cases is on the legislative good-faith effort.[1] Appellants rely on an arbitrary approximation of equality which focuses on the end result, purporting to legitimize the entire districting process on that basis alone. To adopt a *de minimis* rule, as Appellants urge, would permit a state to debase an individual's vote and avoid judicial scrutiny simply on the basis of an arbitrary numerical measure, and would negate the Court's prior determination that "[t]he right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." *Wesberry* v. *Sanders*, 376 U.S. 1, 7 (1964).

The good-faith standard serves as a check on vote debasement and demands that the legislative process strive for equality of value of an individual's vote by not per-

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[1] Although it involves redistricting of a state legislature under the Equal Protection Clause of the 14th Amendment, *Reynolds* v. *Sims*, 377 U.S. 533 (1964), derives its holding from *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and is relied on significantly in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969). The *Reynolds* definition of "as nearly as practicable" focuses on effort, not result:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a state *make an honest and good-faith effort* to construct districts . . . as nearly equal of population as is practicable.

377 U.S. at 577 (emphasis supplied).

mitting the pursuit of a certain political result to submerge the goal of population equality. This Court has clearly recognized that variance, whether large or small, "in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." *Wells*, 394 U.S. at 546 (quoting *Kirkpatrick*, 394 U.S. at 533).

Amicus does not suggest that the deviations produced by P.L. 1982, c.1 are inherently unconstitutional. To do so would be to assert a *de minimis* argument. There may be circumstances where such deviations would be the acceptable result of a good-faith effort to minimize deviations. Although, in a proper case, numbers may be one indication of good faith, they are not, in and of themselves, the measure of good faith. Appellants' attention to the numerical end result of the legislative activity rather than to the activity itself is misplaced. Appellants lost below because of the court's assessment of the legislative purpose and not, as Appellants urge, because the lower court demanded the smallest possible deviation without regard to what the rest of the record showed.

Appellants' argument erroneously focuses on the raw numbers involved and thereby assumes that the final result is prima facie constitutional because it is claimed that the population deviation is within the statistical imprecision of the census. Such an approach wrongly equates the size of the deviation from complete equality with legislative good-faith efforts. These two factors, good faith and absolute equality, are not interchangeable standards. It is good faith that is the proper measure of the constitutionality of the numerical result.

Recognizing that mathematical absolutism in congressional redistricting may, as a practical matter, be beyond reach, *Kirkpatrick* and *White* hold that the inability to

achieve precise mathematical equality must not dissuade state legislatures from striving toward the goal of complete equality in representation. Under *Kirkpatrick* and *White*, therefore, a good-faith effort must remain in the forefront of the legislature's considerations.

If variances in the population of congressional districts are to be upheld, a court must determine, before turning to the justifications that are asserted in defense of the variances, that the variances were not produced in bad faith. Equality in district population, not the representation of political interests, must be the state's preeminent goal. The emphasis in *Kirkpatrick* was—and should be in the case at bar—on the legislative good-faith effort, not on the numerical end result alone.

B. The District Court Properly Found a Lack of Legislative Good Faith

The record in this case amply supports the conclusion below that the New Jersey Legislature did not make a good-faith effort to achieve population equality. The court explicitly found that the legislature regarded some dilution of the vote as acceptable if the result was to advance partisan interests. For example, examination of the record leads inescapably to the conclusion that a dominant motive was the legislative leadership's desire to dilute Republican voting strength. Judge Gibbons, although dissenting, agreed with the court's factual findings that adherence to the goal of population equality was a pretext.[2]

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[2] I join fully in the court's findings of fact and in the rulings on the motions. In particular, I agree that the only effort made by the Democratic legislative leadership to comply with *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed. 2d 519 (1969) was Mr. Karcher's instruction that no plan would be considered which had a population deviation greater than one per cent. . . .

535 F. Supp. at 983, J.S. at 11a (Gibbons, J., dissenting).

Equality of population was not the controlling consideration in New Jersey's redistricting effort but "this constitutional requirement was viewed as merely aspirational, ..." *Daggett* v. *Kimmelman*, *Id.* at 982, J.S. at 8a-9a.

Although Appellants' principal contention is that the good-faith standard as enunciated in *Kirkpatrick* is satisfied by numbers alone, it is clear that this Court did not intend such a simplistic yet rigid rule. Rather, the *Kirkpatrick* opinion does not attempt a general definition of good faith but correctly holds that the standard must be applied to the particular facts presented:

> The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. *Kirkpatrick*, 394 U.S. at 530.[3]

The explicit finding by the court below of a prominent New Jersey legislator's use of a one percent population deviation cutoff point was a finding of bad faith in its most reprehensible form—an intentional effort to limit this Court's prior holdings that population equality is the basic command of the redistricting process.[4]

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[3] Such a definition of good faith is likewise utilized in state legislative redistricting analysis:

> Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman v. *Sincock*, 377 U.S. 695, 710 (1964).

[4] As this Court has previously stated:

> We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimis*. Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable. The district court found, for example,

Appellants' argument that "[t]he constitutional requirements of Article I, § 2, ought not to be reduced to such an illusory quest for mathematical precision," Brief for Appellants at 9, neglects to address the fundamental question raised by the *Kirkpatrick* standard. The real issue before this Court can neither be characterized as the extent of permissible deviation nor as the relationship of deviation to census error. Rather, the proper issue before this Court is whether the proponents of P.L. 1982, c.1 properly met the mandate of *Kirkpatrick* that the resulting population variance was "unavoidable despite a good-faith effort to achieve absolute equality." *Kirkpatrick*, 349 U.S. at 531. The district court below found the deviations existing in P.L. 1982, c.1 neither unavoidable nor produced in good faith:

> It is clear that the .6984% population deviation of P.L. 1982, c.1 is not unavoidable. The legislature had the option of choosing from several other plans with a lower total deviation than .6984%. For example, the Reock plan contained a total deviation of .3250% and only .2960% after it was amended. The DiFrancesco plan, S-3547, introduced on January 4, 1982, had a total deviation of .1253%. The Hardwick plan, A-3817, introduced on January 12, 1982, contained a total deviation of .4515% The Bennett plan, A-614, and the Kavanaugh plan, A-615, although introduced one day after P.L. 1982, c.1 was signed into law, contain total deviations of .1369% and .0293%, respectively.
>
> . . . .
>
> While acknowledging that plans with lower deviations than P.L. 1982, c.1 existed, the leadership be-

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that at least one leading Missouri legislator deemed it proper to attempt to achieve a 2% level of variance rather than to seek population equality.

Kirkpatrick v. *Preisler*, 394 U.S. at 531.

> lieved that population equality was not the only standard.

Daggett v. *Kimmelman*, 535 F. Supp. at 982, J.S. at 8a.

Furthermore, that the district court included as an appendix to its opinion the full text of Speaker Jackman's response to Ernest C. Reock, Jr.'s proposed redistricting map is a clear indication that the Court understood that the true purpose of P.L. 1982, c.1 was to dilute Republican votes as much as possible within a one percent deviation. While Mr. Reock had proposed what he felt to be a politically fair map, Speaker Jackman made it clear that his party's overriding motivation was to maximize Democratic electoral strength, not to minimize population deviation.

The events surrounding the passage of P.L. 1982, c.1 clearly dispute the proffered motivations and justifications now offered in its support. The legislative leaders railroaded a physically and politically gerrymandered bill through the legislature. At the eleventh hour, a lame duck governor signed the bill, precluding involvement by a successor who belonged to another party. The combined action of the legislature and the Governor created an aura of bad faith that permeated the record in this case.

The court below concluded from all the evidence that the New Jersey Legislature had failed to heed the one inexorable mandate this Court has expressed in each of its redistricting decisions since *Baker* v. *Carr*, 369 U.S. 186 (1962). The paramount concern of the legislators in fashioning the New Jersey congressional redistricting plan was a judgment that political affiliation of voters is more important than equally populated districts. Although unavoidable divergences from population equality may be permissible if grounded on legitimate justifications, this Court has never held that the search for equality may be approached by a legislature with the primary intention

that variances may be made for the purpose of diluting the strength of a political minority,[5] and then proceed to purposely ignore mathematical equality and draw district configurations in the belief that such variances may be later justified on other grounds.[6]

The overriding preoccupation of the New Jersey Legislature with factors other than population equality negates any contention that the deviations in P.L. 1982, c.1 resulted despite a good-faith effort to achieve equality. The desired end—enhancement of partisan political interests—controlled the redistricting process in New Jersey and, accordingly, submerged the constitutional mandate of voting equality to a level of pure partisan politics and legislative greed.

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[5] Just as this Court has left open the justiciability of political gerrymandering under the Fourteenth Amendment, so also does Article I, § 2 provide a vehicle to limit gross discrimination against political minorities in congressional districting. The Fourteenth Amendment prohibits intentional discrimination against "racial and political elements of the voting population," *Fortson* v. *Dorsey*, 379 U.S. 433 (1965). Article I, § 2 must be read to similarly prohibit any arbitrary and invidious action which does not constitute a good-faith effort by the State to limit population disparities among congressional districts. As set forth *infra* n. 7, legislative motives can and should be looked to for evidence of bad faith and mal-intent in the context of congressional districting. The record below adequately supports the district court's finding that Appellants were not motivated by a desire to minimize population disparities, but rather a desire to minimize Republican electoral strength.

[6] Although confronted with a sophisticated as opposed to a simple-minded method of voter discrimination, the district court correctly perceived the argument of Appellants as no more than a numbers argument attempting to mask the conspicuous bad faith of the New Jersey Legislature; "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.'" *Reynolds* v. *Sims*, 377 U.S. 533, 563 (1964).

II. NOT ONLY HAVE APPELLANTS FAILED TO DEMONSTRATE A GOOD-FAITH EFFORT TO MINIMIZE DEVIATIONS, THEY HAVE FAILED TO JUSTIFY THOSE DEVIATIONS

A. The Only Applicable Justification in This Case Is Good Faith

This Court in *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), stated that "there is a burden on the proponent of any districting plan to justify deviations from equality." *Id.* at 544. Just as the acceptable population variances for congressional redistricting plans are low, so the acceptable justifications for any such variances are few. This Court has suggested but three possible justifications for deviations from equality in congressional redistricting cases brought under Article I, § 2 of the United States Constitution.

Primary among these, of course, is this Court's statement in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), that some deviation is acceptable if the state can show that it is "unavoidable despite a good-faith effort to achieve absolute equality." *Id.* at 530-31.

Secondly, the *Kirkpatrick* Court suggested that it might permit some population disparities between congressional districts resulting from the legislature's attempt to take into account projected population shifts, but only where these shifts can be predicted with a high degree of accuracy and are thoroughly documented and applied in a systematic manner statewide. *Id.* at 535.

Thirdly, this Court hinted in *White* v. *Weiser*, 412 U.S. 783 (1973), that the state's interest in minimizing the disruption in existing relationships between members of Congress and their constituents might justify variances. *Id.* at 791-92.

There is no claim here that the second and third possible justifications are applicable. Moreover, the only justifica-

tion for population divergences squarely addressed by this Court has been the *Kirkpatrick* Court's good-faith effort justification.[7]

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[7] This Court need not exceed the boundaries of *Kirkpatrick*, as Appellants would have this Court do, to resolve the issues raised in this case. Since the *Kirkpatrick* standard revolves around the good faith of the legislature, the standard could be characterized as one of legislative intent, with the emphasis on the legislative effort or process, rather than upon the end result. It is, in fact, unnecessary to even address the issue of justification if the focus is placed solely on the good-faith intentions of the legislature since proper justification mandates good-faith effort. This Court has, in two recent lines of cases, explained how legislative or state intent is to be determined.

Beginning with *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), and culminating recently in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), and *Rogers* v. *Lodge*, 102 S.Ct. 3272 (1982), this Court has dealt with proof of legislative intent to discriminate in constitutional civil rights litigation.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), this Court used a similar approach in holding that state subordinate jurisdictions can invoke antitrust immunity by pointing to legislative authorization or legislative contemplation of municipal action in a specific area. *Id.* at 1138.

The methods of proof of intent in civil rights litigation are applicable to antitrust litigation. While in the first instance, a governmental entity would generally be attempting to defend against charges of discriminatory motive and in the second instance attempting to prove state legislative motive, the principles involved in each are related. In both situations, the policy underlying an official action is the determinative factor.

Amicus suggests that an analogous approach can be taken to determine whether a legislature has acted in good faith to minimize population deviations. Such a determination would demand a "sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights*, 429 U.S. at 266. In its *Arlington Heights* decision, this Court set forth a non-exhaustive list of factors which are subjects of proper inquiry in determining legislative motive or intent:

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events lead-

B. Appellants' Reliance on the Statistical Imprecision of the Census Is Not a Justification, But a Disguised *De Minimis* Argument

Appellants' primary argument is that this Court should accept the premise that a reapportionment plan that contains deviations below what Appellants claim to be the statistical imprecision of the census data satisfies *Kirkpatrick* and *White*. In effect, Appellants attempt to modify this Court's prior rejection of the argument "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard." *Kirkpatrick*, 394 U.S. at 530.

Appellants' argument that a deviation within the range of the statistical imprecision of the census satisfies *Kirkpatrick* is nothing but an attempt to establish a claimed statistical margin of error of the census as a *de minimis* standard. The district court below recognized this device and explicity rejected such an approach. *Dagget* v. *Kimmelman*, 535 F. Supp. 978, 893, J.S. at 10a.

> ing up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.

Id. at 267-8 (citations and footnotes omitted).

This approach is a workable one, and is consistent with the district court's approach below in reviewing the motives of the New Jersey Legislature.

To adopt Appellants' disguised *de minimis* argument would be antithetical to the true nature of this case. The district court's decision did not turn on the numbers involved but on the failure of the legislature to justify adequately its selection of those numbers. Applying the *Kirkpatrick* standard, the court below determined that P.L. 1982, c.1 could "withstand constitutional attack only if the population variances 'are unavoidable despite a good-faith effort to achieve absolute equality, or . . . [if] justification is shown'." *Id.* at 982, J.S. at 8a. The lower court's standard most certainly was not that which Appellants maintain the court applied: ". . . that the legislature acts unconstitutionally unless it adopts that plan which has the smallest census population deviation. . . ." Brief for Appellants at 15.

Moreover, the factual premise for Appellants' census data argument is lacking. Any estimate of the statistical imprecision of the census is an estimate of a national undercount. These estimates are based on statistical samples conducted after the census. However, the error factor in the census is not known until well after most states have completed the redistricting process, and cannot be used to weigh the deviations of particular plans.

By their own admission, Appellants have no idea what the statistical imprecision of the census really is. Brief for Appellants at 17. The figures presented by Appellants have no solid basis, nor are they applicable nationwide, statewide, or even citywide. There is currently no single, statistically-defensible method to calculate census error in a timely fashion, so there is no basis to compare the deviations of P.L. 1982, c.1 with any specific figure representing census error. The Bureau of the Census has devoted considerable resources to determining the margin of census error, but the various techniques currently used have "inherent difficulties" which may be insurmount-

able.[8] Appellants have no basis for claiming that the 0.6984% deviation in this case is "the functional equivalent of zero." Brief for Appellants at 15. Their claimed ability to show a margin of census error is not, and cannot be, substantiated.

Moreover, the use of data other than actual census data poses a practical problem in the establishment of congressional district lines within a state once congressional seats have been apportioned. Federal law requires state population figures to be produced within nine months after the census date and local figures by three months later. This precludes adjustment of any errors in the census figures by any of the means available.[9] The amount of time after the census date that is required for completing estimates of any undercount for states and substate areas, and then adjusting the count, requires a considerable amount of data other than the census tabulations themselves. The National Academy of Sciences—in a report relied upon in the Brief for Appellants—concludes that one method would require a year and a half to make such adjustments, while other more accurate means would require approximately three years after the census date to adjust census figures.[10]

Because population is constantly shifting within a state, absolute mathematical equality in relation to the true population of districts within a state is impossible both at the time of redistricting and throughout the subsequent decade. Nonetheless, experience in the two decades of redistricting since the Court has adopted the "one

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[8] Testimony of Bruce Chapman, Director of the Bureau of the Census, Field Hearing Before the U.S. Senate Committee on Governmental Affairs, Albuquerque, New Mexico (August 23, 1982), at 8.

[9] National Academy of Sciences, National Research Council, *Counting the People in 1980: An Appraisal of Census Plan* (1978), p. 110.

[10] *Id.* at 105.

person, one vote" standard clearly shows that precise mathematical equality in relation to the census has been achieved time after time to a significantly greater degree than the deviations of the districts here in question. *Cf.* Brief for Appellants at 24, n.20. The fact remains that the census, even if not perfect, is the only reference point from which a good-faith effort to achieve population equality is both possible and measurable.

Moreover, the decennial census is the historic and constitutionally mandated basis for congressional apportionment and redistricting. The very section of the Constitution that provides the basis for the Court's one person, one vote ruling—Article I, § 2—sets forth the decennial census requirement. As a result, the use of data other than actual census data in apportioning the U.S. House of Representatives could present constitutional issues far beyond the issues presented by this case.

In any event, that the census may not be precise is not the issue in this case. The *Kirkpatrick* opinion implicitly recognized the existence of a margin of census error; while the Court pointed out that the census data was "the best population data available to the legislature," 394 U.S. at 528, the Court did allow for the possibility of accommodating population changes occasioned by population shifts, *Id.* at 535. *See also Id.* at 539 n. 3 (Fortas, J., concurring.) As recently as this year, this Court pointed out that, from the time of the very first census, inaccuracies have occurred. *See Baldridge* v. *Shapiro*, 102 S.Ct. 1103, 1109 n.8 (1982).

The New Jersey Legislature make no effort to account for census inaccuracies or to take into account future population shifts. Rather, its leadership determined that a one percent deviation would facilitate partisan gerrymandering—and the record shows that it was this effort to dilute the vote of the political party that was the legislative minority, not any good-faith effort to maximize

voting equality, that prompted rejection of plans with less deviation and greater equality.[11]

No doubt, the legislative majority hoped, as Appellants now urge, that this Court would adopt a *de minimis* standard notwithstanding *Kirkpatrick*. This Court has consistently refused to set such a standard and, unless it is willing to do so at this time and thus establish partisan gerrymandering as a hallmark of legislative good faith, Appellants' argument must be rejected.

Appellants are playing a sophisticated form of numerical gamesmanship. Their reliance upon a collection of inconsistent figures to confuse the issue in this case, Brief for Appellants at 15-18, shifts the proper focus of this case from evidence of good faith to numbers and percentages. Furthermore, Appellants are guilty of the very evil they attribute to the district court. It is Appellants' numbers game, not the decision below, that "substitutes the policies of computer programmers for those of the Legislature." *Cf.* Brief for Appellants at 25.

Appellants' numerical gamesmanship is further apparent in their suggestion that the good-faith/justification standard imperils redistricting plans adopted by other state legislatures under the 1970 census. Brief for Appellants at 22-25. This is but another smoke screen designed to obfuscate the true nature of this case.

This Court did not let such claims deter it from its course in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), in spite of the contention that the majority opinion "impugn[ed] the validity of the election of 398 Representatives from 37 states, leaving a 'constitutional' House of 37 members. . . ." *Id.* at 20-21. (Harlan, J. dissenting.)

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[11] Visual inspection of the map embodying P.L. 1982, c.1's congressional district lines is clear evidence of the motives of the legislative leadership.

Though the various district court panels may have approved redistricting plans with higher deviations than that presented here, the decisions cited by Appellants add nothing to the law already set down by this Court in *Kirkpatrick*: "The extent to which equality may practicably be achieved may differ from state to state and from district to district." 394 U.S. at 530.

C. Preservation of Minority Voting Strength Was Not the Purpose of the Population Variances in This Case

Appellants further attempt to justify the population divergences in P.L. 1982, c.1 by suggesting that "[e]ven if the deviations in P.L. 1982, c.1, were avoidable, they are justified by the legislative policy of preserving minority voting strength." Brief for Appellants at 34.

All three judges below, including dissenting Circuit Judge Gibbons, agreed that Appellants' attempts to justify the population deviations in the plan adopted by the legislature in terms of preserving minority voting strength were merely pretextual. *Amicus* respectfully suggests that Appellants' *ex post facto* attempt at justification is not only a pretext but a cynical attempt to mask the true effect of P.L. 1982, cl.1 on minority voting power.

Although a bill was introduced that would have further enhanced minority voting strength in the Tenth Congressional District, *See* Motion of Edwin B. Forsythe, et al. to Affirm at 10, P.L. 1982, c.1 diluted minority voting strength by placing the City of Orange in the Eleventh rather than the Tenth District. *Daggett* v. *Kimmelman*, 535 F.Supp. 978, 982-3 (1982).

The legislative majority sought not to enhance minority voting strength, but to entrench its party's political position. That the latter objective was accomplished at the *expense* of minority voting strength in the Tenth and

Eleventh Districts makes the attempted justification further suspect.[12]

The district court recognized the political cynicism underlying this purported justification, and correctly arrived at the factual conclusion that there had been no demonstration of a "causal relationship between the goal of preserving minority voting strength in the Tenth District and the population variances in the other districts." 535 F.Supp. at 982.

III. AFFIRMANCE OF THE DECISION BELOW PROVIDES THIS COURT WITH AN OPPORTUNITY TO RESOLVE THE UNCERTAINTY OVER THE PROPER APPLICATION OF *KIRKPATRICK* v. *PREISLER*

Amicus maintains that the judgment of the district court below is supported both by the record and by this Court's expressed standards. Assuming that the decision below is affirmed, as *Amicus* urges, it will then be necessary for the legislature—or in the event of failure there, the district court—to establish a new congressional redistricting plan. The key issue almost certainly will be what factors are constitutionally acceptable in justifying

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[12] Appellants suggest that the preservation of minority voting strength to justify inequalities in districts is supported by this Court's opinion in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Appellants' reliance on this case is improper since *Carey* involved the apportionment of a state legislature and was a case brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973(c). While we would not dispute Appellants' statement that "Section 5 applies as well to congressional reapportionment," Brief for Appellants at 34, n. 36, neither Section 5 nor *Carey* are applicable here.

This is a case brought under Article I, § 2 of the United States Constitution, not the Voting Rights Act, nor the Fourteenth Amendment, nor the Fifteenth Amendment. New Jersey has never been subject to Section 5 of the Voting Rights Act, so a Section 5 analysis is inappropriate here. This case is governed, then, by the principles set forth by this Court in *Kirkpatrick* and other Article I, § 2 cases, not by *Carey*.

deviations from the ideal of absolute population equality among districts.

The decisions in other recent cases have evidenced uncertainty over the appropriate standards to be applied by either a legislature or a court undertaking a redistricting effort.[13] It is therefore appropriate for this Court to pro-

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[13] State legislatures wrestled with redistricting after the 1980 census with varying degrees of success. Of the forty-two states required to redistrict on the basis of the 1980 census, twenty-five became embroiled in litigation concerning the placement of new congressional district lines: Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, West Virginia, and Wisconsin. *See* Council of State Governments & National Conference of State Legislatures, *1 Reapportionment Information Update*, Nos. 1-8 (1981-82).

Legislatures in those states whose congressional delegations changed in size after the 1980 census faced the most difficult redistricting task. Of the nineteen states that were forced to readjust drastically their congressional districts to accommodate this change, nine failed to achieve a completely acceptable plan. Of that nine, four states—Colorado, Illinois, Michigan, and Missouri—failed to enact redistricting statutes, forcing the United States District Courts in those states to construct redistricting plans. Illinois and Missouri each failed to gain passage of a plan through both houses of their legislature. *See In re Illinois Congressional Districts Reapportionment Cases*, Master File No. 81 C 3915 (N.D. Ill. Nov. 23, 1971), *aff'd mem. sub nom. Ryan* v. *Otto*, 102 S.Ct. 985 (1982); *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo. 1982), *aff'd mem. sub nom. Schatzle* v. *Kirkpatrick*, 102 S.Ct. 2248 (1982). The Colorado and Michigan legislatures passed plans but were unable to override their governors' vetoes. *See Carstens* v. *Lamm*, 543 F. Supp. 68 (D. Colo. 1982); *Agerstrand* v. *Austin*, No. 81-40256 (E.D. Mich. May 24, 1982).

The results in the five remaining states where the legislature did pass a redistricting plan—Texas, California, Pennsylvania, Ohio and New Jersey—were mixed. Texas's enacted plan was modified by the district court under the terms of the Voting Rights Act. *See Upham* v. *Seamon*, 102 S.Ct. 1518, *rev'ing per curiam* 936 F. Supp. 931 (E.D. Tex. 1982). California's plan was rejected by the voters in

vide guidance for the further conduct of this proceeding and in the process, provide direction to other legislatures and courts.

Some questions that arose in this case and other redistricting cases following the 1980 census were resolved by *Kirkpatrick*, where the Court rejected a number of attempted justifications put forth by the State of Missouri for the population deviations inherent in the challenged plan. The state attempted to justify the deviations by suggesting (1) "that variances were necessary to avoid fragmenting areas with district economic and social interests"; (2) that the population differences were justifiable as "a reasonable legislative compromise"; and (3) that the variances resulted from the "State's attempt to avoid fragmenting political subdivisions." The *Kirkpatrick* Court rejected each of these proffered justifications as inadequate to justify a districting plan which did not otherwise pass constitutional muster. In rejecting two additional justifications proposed by the state that, (4) certain variances resulted from the legislature's "taking account of the fact that the percentage of eligible voters . . . differed significantly

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a referendum. *See Assembly* v. *Dukmejian*, 30 Cal. 3d 638, 180 Cal. Rptr. 297, 639 P.2d 939, *appeal dismissed and cert. denied sub nom. Republican National Committee* v. *Burton*, 102 S.Ct. 2003 (1982) Pennsylvania's plan was approved by the district court on the basis of legislative good faith. *See In re Pennsylvania Congressional Districts Reapportionment Cases*, Civil Action No. 82-0197 (M.D. Penn. Sept. 18, 1982). Ohio enacted a plan that is in a state of limbo. In *Flanigan* v. *Gillmore*, Case Nos. C-2-82-173, -394 (S.D. Ohio May 25, 1982), the district court held in abeyance the constitutionality of the Ohio plan's population deviation pending this Court's decision of the case at bar. Finally, of course, the New Jersey plan was declared unconstitutional by the district court in the decision appealed from here.

This analysis excludes South Dakota and Nevada. South Dakota's delegation was reduced to a single member, to be elected at large. Nevada's delegation was increased from one Representative to two, making the redistricting task limited to drawing a single boundary line.

from district to district," and (5) that the population disparities resulted "from the legislature's attempt to take into account projected population shifts," this Court found the proposals to be unsupported either by applicable law or the record in the case. 394 U.S. at 533-36.

Similarly, the district court below properly rejected Appellants' attempts to justify the population disparities among New Jersey's congressional districts as illusory, *ex post facto* explanations unsupported by the record.

While this Court outlined in *Kirkpatrick* the need for state legislatures to make good-faith efforts to minimize population disparities and to justify those disparities, there remains considerable diversity among the district courts in the application of the *Kirkpatrick* standard. Because of this disparity, there exists a more general need for this Court to elaborate on its *Kirkpatrick* decision. *Amicus* respectfully submits that the case at bar provides the vehicle to resolve those disparities by further discussion of the meaning of *Kirkpatrick* for the guidance of the legislature and the court below in the redistricting effort that must follow affirmance of the decision below.

Such action by this Court also would aid legislatures in their redistricting task, facilitate the successful performance of their redistricting duties, and help relieve the district courts of the considerable burden of repeatedly having to assume what should primarily be a legislative responsibility.

To the extent that United States District Courts would continue to act as redistricting mechanisms, additional direction from this Court would simplify that task and, in the process, would generate greater consistency in the factors applied in developing court-ordered plans. At present, the variation in criteria used by the district courts forced to redistrict by court order has created inconsistency in judicial opinions. While some district

courts adhere to a strict standard of population equality,[14] other courts have relegated attempts to minimize deviations to the same level as a variety of non-constitutional factors.[15]

The district courts are in considerable disagreement over the weight to be given factors other than population when formulating redistricting plans.[16] The varying justi-

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[14] *See La Comb* v. *Growe*, 4-81 Civ. 414 (D. Minn. March 11, 1982), *aff'd mem. sub nom. Orwall* v. *LaComb*, 50 U.S.L.W. 3915 U.S. May 17, 1982); *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo.), *aff'd mem. sub nom. Schatzle* v. *Kirkpatrick*, 102 S.Ct. 2248 (1982); *Agerstrand* v. *Austin*, No. 81-40256 (E.D. Mich. May 24, 1982).

[15] *See O'Sullivan* v. *Brier*, 540 F. Supp. 1200, 1206 (D.Kan. 1982) ("Modern computer technology would permit us to achieve almost zero deviation among districts if we ignored all other considerations. But *Kirkpatrick* did not address variances of the small magnitude at issue here. . . ." The court rejected a proposed plan with a deviation of 0.09%, adopting a plan with a 0.338% deviation.); *Doulin* v. *White*, 5353 F. Supp. 450 (E.D. Ark. 1982) (rejecting plans with deviations below 0.20% in favor of a court-ordered plan with 0.78% deviation); *South Carolina State Conference of Branches of the NAACP, Inc.* v. *Riley*, 533 F. Supp. 1178 (D.S.C.: 1982), *appeal docketed*, No. 82-535 (U.S. Aug. 25, 1982) (court adopted plan with 0.28% deviation, rejecting alternative plan with a deviation of 0.0656%).

[16] Courts have given substantial weight to legislative enactments vetoed by the governor, *Agerstrand* v. *Austin*, No. 81-40256 (E.D. Mich. May 24, 1982), or objected to under the Voting Rights Act, as amended, 42 U.S.C. 1973(c), *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeal docketed sub nom. Brooks* v. *Winter*, No. 82-233 (U.S. Aug. 10, 1982). However, other courts have given minimal weight to vetoed bills, regarding them as merely "proferred current policy." *Carstens* v. *Lamm*, 543 F. Supp. at 68, 79 (D.Colo. 1982); *O'Sullivan* v. *Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982).

The district court that redistricted Kansas regarded preservation of communities of interest "as the lodestar of our analysis." *O'Sullivan* v. *Brier*, 540 F. Supp. at 1204; *cf. Carstens* v. *Lamm*, 543 F. Supp. at 96; *La Comb* v. *Growe*, 4-81 Civ. 414, slip op. at 5 (D.Minn. Mar. 11, 1982), *aff'd mem. sub nom. Orwell* v. *LaComb*, 50 U.S.L.W. 3915 (U.S. May 17, 1982). The district court in Illinois,

fications accepted by the district courts suggests that, notwithstanding this Court's straightforward guidance in *Kirkpatrick* v. *Preisler*, confusion over the applicable standards in such cases is growing. As suggested by *Amicus*, *supra* n.7, this Court has already created the framework for a workable inquiry into the good-faith efforts of a state to minimize population deviations. Any clarification this Court might offer in eliminating misunderstandings regarding the proper application of *Kirkpatrick*, would not only serve to eliminate such confusion, but it would also help alleviate the overwhelming judicial backlog, and expedite the hearing of higher priority cases.

Appellants attempt to capitalize on the current disparity in reasoning among the district courts by suggesting that the treatment given the facts in other redistricting cases supports Appellants' mistreatment of the law in this case. In setting forth its seminal guidelines in *Kirkpatrick*, this Court noted that "[t]he extent to which equality may practicably be achieved may differ from State to State and from district to district," 394 U.S. at 530. Although the "circumstances of each particular case" may be weighed in determining the constitutionality of a given redistricting plan, *Id.*, nothing in *Kirk-*

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however, adhered to the premise that "to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical" to *Kirkpatrick*. *In re Illinois Congressional District Reappointment Cases*, No. 81 C 3915, slip op. at 25 (N.D.Ill. Nov. 23, 1982), *aff'd mem. sub nom. Ryan* v. *Otto*, 102 S.Ct. 985 (1982). While a significant number of district courts sought to preserve political subdivision boundaries, *e.g.*, *Carstens* v. *Lamm*, *La Comb* v. *Growe*, the court in Illinois rejected this criteria also as contrary to *Kirkpatrick*. *In re Illinois Congressional Districts Reapportionment Case*, slip op. at 25.

The goal of compactness and contiguity also has received varying treatment. The court in Missouri rated it second only to population equality as a redistricting standard, *Shayer* v. *Kirkpatrick*, 541 F. Supp. at 934 while the court in Colorado described it as "probably the least significant" of the non-constitutional criteria utilized. *Carstens* v. *Lamm*, 543 F. Supp. at 87.

patrick suggests that the *ad hoc* approach to redistricting standards advocated by Appellants—and used by a number of district courts since the 1980 census—is appropriate. *Kirkpatrick* permits the facts to be considered in light of applicable law; it should not permit, as Appellants maintain, those facts to change the law.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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